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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 JOHN BURNELL, JACK POLLOCK, and all
11 others similarly situated,

12 Plaintiffs,

13 vs.

14 SWIFT TRANSPORTATION CO. OF
15 ARIZONA, LLC,

16 Defendant.
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Case No. 5:10-cv-00809-VAP (OP)

Hon. Virginia A. Phillips

**Objection of Sadashiv Mares to
Certification and Settlement**

Date: August 12, 2019

Time: 2:00 p.m.

Room: 8A

Courtroom 2

The Proposed Settlement of Rest Period Claims Is Unreasonably Low.

As counsel for *Mares*, I am actively prosecuting an appeal of this Court's judgment on the rest period claims. *Mares v. Swift Transportation*, Ninth Cir. Case No. 19-55065. I have recently filed the appellant's opening brief. Thus, as far as the rest period claims go, I feel uniquely qualified to assist the Court in assessing whether the *Rudsell/Burnell* analysis accurately estimates the potential exposure on the rest period claims.¹

A. The Potential Exposure for Rest Period Claims is About \$350 Million, Not \$48 Million.

To begin, the *Rudsell/Burnell* analysis is not at all transparent about its method for calculating rest period exposure, and so it must be reverse engineered. For some unexplained reason the analysis begins not with rest period exposure, but with wage claim exposure. It states that 2500 drivers losing 70 minutes of time each day would be owed \$7,437,500 of unpaid wages in a year. *Rudsell* Dkt. 32 at 20. Divide this annual amount owed (\$7,437,500) by the number of drivers (2500), and you find that each year an individual driver would be owed \$2,975. Divide this amount (\$2,975) by the number of days in a year (365), and you find that each day a driver would be owed \$8.15 – for 70 minutes of work. It follows that the hourly rate underpinning this entire analysis is \$6.99 (\$8.15 x [60 min/70 min]).

How did the *Rudsell/Burnell* analysis determine this hourly rate of \$6.99? There is no explanation provided. It is, of course, much less than the minimum wage rate, and drivers typically make much, much more than the minimum wage. Nevertheless, this absurdly-low

¹ Although I am not here assessing the valuations of other claims (e.g., unpaid wages, meal period, etc.), I should note that the *Rudsell/Burnell* analysis of these other claims is similarly flawed because it relies on the same unreasonable hourly rate (\$6.99/hr) and the same unreasonable number of workweeks (850,000). See text, *infra*.

1 \$6.99 per hour rate is a fundamental pillar of the entire exposure analysis.

2 The other pillar of the analysis is the number of workweeks. According to the
3 settlement agreement, there were 850,000 workweeks. *Rudsell* Dkt. 32-1 at 17. But
4 according to the original *Rudsell/Burnell* analysis, there were actually 1,690,000 workweeks
5 (2500 drivers x 52 wks/yr x 13 years), almost double the amount upon which the settlement
6 was based. *Rudsell* Dkt. 32 at 14. The *Rudsell/Burnell* parties partially walked back this
7 number in their revised analysis, indicating that there were only 1,362,400 workweeks ([1600
8 drivers x 52 wks/yr x seven years] + 2500 drivers x 52 wks/yr x six years]). *Burnell* Dkt. 193
9 at 28. No attempt was made, however, to explain why the parties based their settlement on
10 the absurdly-low and admittedly unsupported estimate of 850,000 workweeks.
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13 After using the low hourly rate and the low workweek figure to estimate the loss of
14 unpaid wages, the *Russell/Burnell* analysis then turns to the rest period exposure. Here is its
15 entire analysis: "Valuing this claim at approximately 50% of the unpaid wages is probably
16 reasonable. . . ." *Rudsell* Dkt. 32 at 21. That is it. That is the complete analysis. Since it
17 valued the unpaid wages exposure at \$96 million, it valued the rest period claim exposure at
18 \$48 million – because doing so was "probably reasonable." *Id.* at 20-21.
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21 By way of contrast, how would I value the potential exposure for the "one additional
22 hour of pay" remedy for rest period violations? I would certainly not begin with an analysis
23 of lost wages and then cut that figure in half. Instead, I would multiply the total number of
24 workdays (total possible violations) by the average hourly wage ("one additional hour of
25 pay"). Labor Code Sec. 226.7(c). If we assume that the latest *Rudsell/Burnell* estimate of
26 workweeks is the best estimate, then there were 9,536,800 workdays (1,362,400 workweeks x
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1 seven days/wk). If we assume the more realistic hourly rate of \$22/hr, then the "one
2 additional hour of pay" remedy would total about \$210 million (9,536,800 workdays x
3 \$22/day).

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5 But this is not the entire exposure because the proposed settlement lumps in PAGA
6 penalties as well. The maximum PAGA penalties for Labor Code Section 226.7(c) violations
7 would be (at least) \$100 per pay period. Labor Code Sec. 2699(f)(2). Thus, if there were
8 1,362,400 workweeks, and a weekly pay period, then there would be an exposure to penalties
9 totaling \$136,240,000.

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11 Thus, I estimate that the total exposure on the rest period claims is approximately \$350
12 million (\$210,000,000 + \$136,000,000), more than seven times the \$48 million exposure
13 estimated by the *Rudsell/Burnell* analysis.

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16 **B. The Proposed \$1.65 Million Settlement of Rest Period Claims Would Discount**
17 **These Claims by 99.5%.**

18 According to the *Rudsell/Burnell* analysis the total exposure for all claims, wage, rest
19 period, etc., is \$211 million. *Burnell* Dkt. 193 at 27. The portion allocated to rest periods is
20 \$48 million. *Id.* By multiplying the proposed settlement amount (\$7,250,000) by the ratio
21 of rest period exposure to total exposure, we can calculate the amount the settlement allocates
22 to rest period claims: \$1.65 million (\$7,250,000 x \$48M/\$211M).

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24 \$1.65 million is a discount of about 97% from the *Rudsell/Burnell* exposure estimate
25 of \$48 million. It is a discount of 99.5% from the more realistic exposure estimate of \$350
26 million.

Conclusion.

The total exposure in this case for rest period claims alone is approximately \$350 million. In my view, settling the rest period claims for a mere \$1.65 million would ill-serve the interests of the class members.

Respectfully submitted,

Dated: August 2, 2018

aiman-smith & marcy

/s/ Joseph Clapp
Joseph Clapp, Esq.
Attorneys for Plaintiff

PROOF OF SERVICE

I, the undersigned, hereby declare: I am employed in the County of Alameda, California; I am over eighteen years of age and not a party to the within action. I am either admitted to practice before this Court or employed in the Office of an attorney admitted to practice in this Court. My business address is 7677 Oakport, Suite 1150, Oakland, California 94621.

I hereby certify that on this date, the foregoing:

Objection of Sadashiv Mares to Certification and Settlement

was filed electronically with the Clerk of the court to be served by operation of the Court's ECF/PACER electronic filing system to all counsel of record. Parties may access documents through the Court's system, or as indicated below:

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Neal J. Fialkow, Esq. James S. Cahill, Esq. Law Office of Neal J. Fialkow, Inc. 215 N. Marengo Avenue, 3 rd Floor Pasadena, CA 91101 nfialkow@pacbell.net	Attorneys for Lawrence J. Peck, in re <i>Peck v. Swift Transportation Company of Arizona, LLC</i> Service by US Mail and Email, only

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15 I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct.

17 Dated: August 2, 2019

18 /s/ Norma Dale
19 Norma Dale